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Appeals Court Clarifies That Email Memorializing Settlement Need Not Be Separately Signed

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By Jason Grant | July 14, 2021

Justice Peter Moulton. Photo: Rick Kopstein/ALM

In a ruling that brings state-court litigation practice more in line with modern-day email use, while clarifying for litigators whether settlement agreements memorialized in more informal emails are binding, a state appeals court has ruled lawyers do not need to "re-type" their signature into a settlement-agreement email for it be binding.

The decision by the Appellate Division, First Department court "clarifies" for practitioners an issue that it said the state's high court has "not opined on": Whether in sending email with settlement terms to opposing counsel, attorneys must retype in their own name, above or below their already listed computer-prepopulated signature box, for the agreement to be binding.

It appears the Appellate Division, First Department's ruling (https://www.nycourts.gov/reporter/3dseries/2021/2021_04284.htm) will be precedent statewide because it does not appear that a case laying out the same facts—a dispute over the enforceability of an email memorializing a settlement in which a signature box was included but there was no retyped lawyer name—has been decided by another Appellate Division department in the state, according to veteran civil litigator Mark Zauderer, a named partner at Ganfer Shore Leeds & Zauderer in Manhattan.

The First Department, which handles appeals from Manhattan and the Bronx, did distinguish its ruling and the case before it from a 2013 Appellate Division, Second Department opinion in which that court said that the fact that a lawyer, in a settlement email, had retyped in her name by writing "Thanks Brenda Greene," was supportive of the conclusion that she'd effectively signed the email message and thereby met the "subscription" requirement set out under state statute CPLR 2014 regarding "stipulations."

In its lengthy opinion signed by Justice Peter Moulton, a unanimous First Department panel explained that in the case before it, the issue was that in using email to set out a personal injury settlement between respondent Erika Kendall and her employer's insurer, Philadelphia Insurance Indemnity Co., the lawyer for Kendall had a prepopulated signature box in the key email but the attorney (who was not named in the opinion) did not separately retype his or her name into the email.

At the lower-court level, Manhattan Supreme Court Justice Lynn Kotler had ruled in 2020 that because there was no retyping by Kendall's lawyer of his or her name, the settlement terms set out by the attorney was not binding, according to Moulton.

Specifically, Moulton wrote, the lower court had "found that the retyping of a name is required for an email to be 'subscribed' and therefore a binding stipulation under CPLR 2104."

At stake in whether Kendall's lawyer's email memorializing a settlement was $575,000 in settlement money. Moulton explained that in the Kendall matter, Kendall had been hit while driving her employer's car in 2014, and that subsequently she brought a claim under the supplementary underinsured motorist benefit provision of her employer's automobile policy with Philadelphia Insurance.

Then, in 2019, an arbitrator awarded Kendall $975,000 in insurance money to be paid by Philadelphia Insurance, but neither Kendall's lawyer nor the company's lawyer received the faxed arbitration decision. The respective attorneys continued to negotiate, later arriving at a settlement of $400,000, Moulton wrote. Kendall's lawyer sent an email to the company's counsel about the $400,000 settlement, which was only prepopulated with a signature box. Subsequently, Kendall's lawyer learned of the arbitration decision and said they would not proceed with the $400,000 settlement.

Moulton, in reversing Kotler's decision that the $400,000 settlement email from Kendall's lawyer was unenforceable, wrote, "We now hold that this distinction between prepopulated and retyped signatures in emails reflects a needless formality that does not reflect how law is commonly practiced today. It is not the signoff that indicates whether the parties intended to reach a settlement via email, but rather the fact that the email was sent."

Moulton continued, "Since 1999, New York State has joined other states in allowing, in most contexts, parties to accept electronic signatures in place of 'wet ink' signatures. … Moreover, the [state] statutory definition of what constitutes an 'electronic signature' is extremely broad under the ESRA, and includes any 'electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record,'" quoting State Technology Law §302[a].

In an emailed comment on the First Department's ruling on the signature issue, Zauderer, the veteran litigator at Ganfer Shore, said, "This decision is important not only for the procedural guidance it provides on an unsettled issue, but as a prime example of how the law adapts to changing circumstances. Lawyers need this kind of helpful clarification for their everyday practice, but it is also a reminder that the law is not static—and that the courts are mindful of the impact of their decisions."

Matthew Toker, a partner at White Werbel & Fino who represented Philadelphia Insurance in the appeal, could not be reached for comment.

Nor could Huy Le, of counsel at the Law Offices of Bryan Barenbaum, who represented Kendall.
